Public Prosecutor v Tan Sri Eric Chia Eng Hock

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO 43–11 OF 2005
ABDULL HAMID EMBONG J
6 MAY 2005

Criminal Procedure — Revision — Revisory power of High Court — Jurisdiction — Order of session court on admissibility of evidence — Whether issue open to a revision by the High Court — Criminal Procedure Code s 323

Criminal Procedure — Revision — Application for — Application to admit evidence recorded earlier by a magistrate in Hong Kong — Mutual Assistance in Criminal Matters Act 2002 s 8 (1) & (2) — Whether consideration for relevancy of evidence under s 33 of the Evidence Act 1950 govern s 8(1) of the Mutual Assistance in Criminal Matters Act 2002

The accused person was faced with a charge under s 409 of the Penal Code and the trial was before the Sessions Court at Kuala Lumpur. The prosecution had sought to adduce certain evidence recorded earlier by a magistrate in Hong Kong ('the Hong Kong evidence') pursuant to the Attorney General of Malaysia's request under the provisions of the Mutual Assistance in Criminal Matters Act 2002 ('MACMA') but this was objected to by the defence. The learned sessions court judge after hearing arguments on the admissibility of that Hong Kong evidence ruled it to be inadmissible. The learned deputy public prosecutor wrote in to the High Court and requested for a revision of that order by the sessions court judge.

Held:

(1) The issue at hand was certainly open to a revision by the High Court. To disallow that Hong Kong evidence would be a miscarriage of justice in the sense that the prosecution would be hampered from putting across its full and best evidence for the trial court's consideration. The High Court was not barred from reviewing the order made by the learned sessions court judge. There was no legal basis for restraining the High Court's powers in exercising its reversionary power. If there arises a situation where the subordinate court had misconceived the law and this resulted in a miscarriage of justice position, then the High Court is obliged to act under s 323 of the Criminal Procedure Code (see para 6).

(2) Section 33 of the Evidence Act 1950 ('EA') had no application in this case. The proceeding before the magistrate in Hong Kong was not a previous judicial proceeding envisaged under s 33 of the EA. The consideration for

relevancy of evidence under s 33 of the EA did not govern this aspect of the evidence under s 8(1) of the MACMA. The latter section allows for off-shore evidence taking upon his subjective satisfaction that such evidence, as in the Hong Kong evidence here, would be relevant in any criminal proceedings within Malaysia, such as this trial of the accused person. It did not require to pass the test and qualifications laid down in s 33 of the EA (see para 10).

(3) Public policy demanded that s 8(1) of the MACMA be given a wider latitude and not be shackled by the dictates of technicalities found under the EA, notwithstanding its mention in s 8(3) of the MACMA. The reception of evidence recorded pursuant to s 8(1) of MACMA should not therefore be hampered by the requirements of the EA. This special law should be allowed to operate to its maximum efficacy. To subject its operation to the technical requirements as found under s 33 of the EA would render Parliament's intention of a speedy and convenient method of evidence taking overseas, as nugatory (see para 11). MACMA should be read with a degree of liberty so that its objective is met (see para 15).

[Bahasa Malaysia summary

Tertuduh menghadapi pertuduhan di bawah s 409 Kanun Keseksaan dan perbicaraan diadakan di Mahkamah Sesyen Kuala Lumpur. Pihak pendakwa telah memohon untuk mengemukakan keterangan tertentu yang telah direkodkan sebelumnya oleh majistret di Hong Kong ('keterangan Hong Kong') berikutan permohonan Peguam Negara Malaysia di bawah peruntukan Akta Bantuan Bersama Dalam Perkara Jenayah 2002 ('MACMA') tetapi ini dibantah oleh pihak pembela. Hakim mahkamah sesyen selepas mendengar hujah berkaitan kebolehterimaan keterangan Hong Kong itu telah memutuskan ia tidak boleh diterima. Timbalan pendakwa raya yang bijaksana telah menulis kepada Mahkamah Tinggi untuk satu semakan terhadap perintah oleh hakim mahkamah sesyen itu.

Diputuskan:

(1) Persoalan di sini sememangnya terbuka untuk semakan oleh Mahkamah Tinggi. Untuk tidak membenarkan keterangan Hong Kong merupakan satu kegagalan melakukan keadilan di mana pihak pendakwa akan terhalang daripada mengemukakan keterangannya yang kukuh dan terbaik untuk pertimbangan mahkamah perbicaraan. Mahkamah Tinggi tidak dihalang daripada mengkaji semula perintah yang dibuat oleh hakim mahkamah sesyen yang bijaksana. Tiada asas sah untuk menghalang kuasa Mahkamah Tinggi menggunakan kuasa semakannya. Jika timbul keadaan di mana mahkamah bawahan menyalah tanggap undang-undang dan ia mengakibatkan kegagalan dalam melaksanakan keadilan, maka Mahkamah Tinggi wajib bertindak di bawah s 323 Kanun Tatacara Jenayah (lihat perenggan 6)

(2) Seksyen 33 Akta Keterangan 1950 ('EA') tidak digunakan dalam kes ini. Prosiding di hadapan majistret di Hong Kong bukan satu prosiding kehakiman sebelumnya yang terkandung di bawah s 33 EA. Pertimbangan untuk kaitan keterangan di bawah s 33 EA tidak mengawal aspek keterangan ini di bawah

A s 8(1) MACMA. Seksyen ini membenarkan keterangan luar negara jika beliau berpuas hati bahawa keterangan sedemikian, seperti dalam keterangan Hong Kong ini, adalah berkaitan dalam mana-mana prosiding jenayah di Malaysia, seperti perbicaraan ini berhubung tertuduh. Ia tidak perlu lulus ujian dan kelayakan seperti yang dinyatakan dalam s 33 EA (lihat perenggan 10).

B (3) Polisi awam menuntut bahawa s 8(1) MACMA diberikan makna lebih luas dan tidak dibelenggu alasan-alasan teknikal di bawah EA, meskipun ia dinyatakan dalam s 8(3) MACMA. Penerimaan keterangan yang direkodkan menurut s 8(1) MACMA tidak patut dihalang oleh keperluan EA. Undang-undang khas ini hendaklah dibenarkan untuk beroperasi dengan keberkesanan maksimum. Jika operasinya tertakluk kepada keperluan teknikal
C seperti di bawah s 33 EA maka ia akan menyebabkan niat Parlimen untuk satu cara yang cepat dan sesuai membawa keterangan ke luar negara, adalah tidak berguna (lihat perenggan 11). MACMA patut dibaca dengan lebih meluas agar objektifnya tercapai (lihat perenggan 15).]

D **Notes**

For cases on application for revision, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2939–2950.

For cases on revisory power of High Court, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2998–3015.

E **Cases referred to**

Attoney General of Malaysia v Gapari bin Kitingan [1990] 3 MLJ 307 (refd)
Goodwin v Phillips (1908) 7 CLR 1 (refd)
Liaw Kwai Wah & Anor v Public Prosecutor [1987] 2 MLJ 69 (refd)

F **Legislation referred to**

Courts of Judicature Act 1964 s 31
Criminal Procedure Code s 323
Evidence Act 1950 ss 6–16, 33
Evidence Ordinance [HK] s 77F
G Mutual Assistance in Criminal Matters Act 2002 s 8(1), (3), 9
Penal Code s 409
Rules of the High Court 1980 O 39 r 2

Mohd Yusof bin Zainal Abiden (Tun Majid bin Tun Hamzah dan Nordin bin Hassan with him) (Public Prosecutor, Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
H *Muhammad Shafee bin Abdullah (Amy Chong Boon Chin with him) (Shafee & Co) for the accused.*

Abdull Hamid Embong J:

I

[1] The accused person is facing a charge under s 409 of the Penal Code and the trial is currently ongoing before the Sessions Court at Kuala Lumpur. The prosecution had sought to adduce certain evidence recorded earlier by a magistrate in Hong Kong (the Hong Kong evidence) pursuant to the Attorney

General of Malaysia's request under the provisions of the Mutual Assistance in Criminal Matters Act 2002 (MACMA) but this was objected to by the defence. The learned sessions court judge after hearing arguments on the admissibility of that Hong Kong evidence ruled it to be inadmissible. The learned deputy public prosecutor wrote in to this court on 26 April 2005, requesting for a revision of that order by the sessions court judge. On 27 April 2005, I invited learned counsel for the accused and the learned deputy to address this court on the issue of admissibility of that Hong Kong evidence.

WHETHER THIS COURT CAN EXERCISE ITS POWERS OF REVISION?

[2] Learned counsel for the accused first raised a preliminary point on whether this is a fit and proper matter for this court to exercise its revisionary power. He contended that the power of revision is confined to those findings or orders made by a subordinate court which are so obviously improper or manifestly illegal, that even on a cursory inspection of the records the High Court could make an order for a revision without hearing submissions. In this case, learned counsel argued, the issue at hand was lengthily argued in the sessions court and the order to disallow the Hong Kong evidence cannot be said to be a glaring error, now subjected to this court's revisionary power. It was also submitted that that order could be appealed against after completion of the trial. This call for a revision was therefore a back door way of appealing.

[3] Revisionary orders are opened to both issues of law and procedure as can be seen from its sources under s 323 of the Criminal Procedure Code, and s 31 of the Courts of Judicature Act 1964 which states respectively:

> 323. Powers to call for records of subordinate courts
>
> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
>
> 31. Revision of criminal proceedings of subordinate courts
>
> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

[4] When some real or substantial injustice has occurred, the High Court is duty bound to intervene. This is a special power, the extent of which is unfettered and wide. It has been described as a paternal supervisory jurisdiction and may be invoked to correct any miscarriage of justice (see *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69).

[5] Miscarriage of justice is a wide but not an abstract concept. This court is to determine that there is fair play all round, in this instance to balance the interests of the Public Prosecutor who represents the public at large and the accused person. This was foremost in my mind when I called the matter up for a revision. The parties

A have no right of appearance or audience either personally or by counsel, before a judge exercising this discretionary power (see s 326 of the CPC and the equivalent s 36 of the CJA). However the judge may allow a person to be heard if the final order it makes is to that person's prejudice. With this in mind, I had allowed both parties to address the court.

B

[6] It is my view that the issue at hand is certainly open to a revision by this court. It is also my view that to disallow that Hong Kong evidence would be a miscarriage of justice in the sense that the prosecution would be hampered from putting across its full and best evidence for the trial court's consideration. As such, I disagreed with the stand taken on this preliminary point that this court is barred from reviewing the C order made by the learned sessions court judge. I cannot see any legal basis for restraining this court's powers in exercising its reversionary power. As earlier stated, if there arises a situation where the subordinate court had misconceived the law and this resulted in a miscarriage of justice position as I found to arise here, then this court is obliged to act under s 323 of the CPC.

D

ADMISSIBILITY OF THE HONG KONG EVIDENCE

[7] The Hong Kong evidence was taken in a proceeding by a magistrate in Hong Kong. It was recorded pursuant to the request of the Attorney General of Malaysia E under s 8(1) of MACMA. Under that section, once the Attorney General is satisfied that such evidence is relevant it may pursue to gather such evidence. The effect of this section is similar to evidence taken out of jurisdiction for use in a civil proceeding under O 39 r 2 of the Rules of the High Court 1980. In *Attoney General of Malaysia v Gapari bin Kitingan* [1990] 3 MLJ 307, Haidar J held that this O 39 r 2 procedure F could even be made applicable to criminal proceedings with the necessary variations made to the request, even without the necessity of attempting to procure those overseas witnesses to attend and give evidence in the Malaysian court. Once that evidence is tendered before the trial court it may be admitted under s 8(3) of the MACMA, which states

G

> (3) Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 (Act 56) and the Criminal Procedure Code (Act 593), be admitted as evidence at any criminal proceedings to which the request relates.

H

[8] Learned counsel for the accused fervently argued that the qualification 'subject to the Evidence Act' stated in that section must mean that it had to come within the regime of s 33 of the Evidence Act 1950, which states that:

I

> 33. Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated
>
> Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the

way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:

Provided that —

(a) the proceeding was between the same parties or their representatives in interest;

(b) the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) the questions in issue were substantially the same in the first as in the second proceeding.

In short, if the conditions stated in the proviso of s 33 are met, evidence given in a previous judicial proceeding becomes relevant in a subsequent trial to prove that fact stated when that witness is, inter alia, dead or cannot be produced without considerable delay or expense.

[9] Learned counsel argued that the situation in this case is actually reversed in that in obtaining the Hong Kong evidence much money and time was unnecessarily spent and that the prosecution had not even attempted at procuring those witnesses in Hong Kong to testify in Malaysia, which the Attorney General could request for under s 9 of MACMA.

[10] In my view, s 33 of the Evidence Act 1950 has no application here. Firstly, the proceeding before the magistrate in Hong Kong is not a previous judicial proceeding envisaged under that section. More importantly, the consideration for relevancy of evidence under s 33 does not, in my view, govern this aspect of the evidence under s 8(1) of the MACMA. The latter section allows for off-shore evidence taking upon his subjective satisfaction that such evidence, as in the Hong Kong evidence here, would be relevant in any criminal proceedings within Malaysia, such as the ongoing trial now of the accused person. It does not require to pass the test and qualifications laid down in s 33 of the Evidence Act 1950.

[11] MACMA, as the name suggests is a specific piece of legislation to facilitate mutual assistance in criminal matters. It is extra territorial in scope and being a law that transcends national boundary, it has to be read as special in its effect. In my view, public policy demands that it be given a wider latitude and not be shackled by the dictates of technicalities found under the Evidence Act 1950, notwithstanding its mention in s 8(3). The reception of evidence recorded pursuant to s 8(1) of MACMA should not therefore be hampered by the requirements of the Evidence Act 1950. In my view, this special law should be allowed to operate to its maximum efficacy. To subject its operation to the technical requirements as found under s 33 of the Evidence Act 1950 would render Parliament's intention of a speedy and convenient method of evidence taking overseas, as nugatory.

[12] Even if assuming that s 33 of the Evidence Act 1950 applies, I would still hold that MACMA, as a special legislation must be deemed to override that provision. In *Goodwin v Phillips* (1908) 7 CLR 1, it was said:

The conflict between the two sections is one of the kinds to which Sir George Jessel MR refers in *Taylor v Oldham Corporation*. Where there is general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject-matter,

the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.

[13] A commentary in NS Bindra's *Interpretation of Statutes* (1997) at p 510, makes the following observation, in an apparent conflict situation:

> Conflict between general Acts and special statutes
>
> In case of statutes on same subject the rule of construction is to so interpret the enactments that they shall be if possible consistent. But if they cannot be fairly read in such a way as to give full meaning to each consistently with the other, then one must give way, and the one to give way will be the general provision. *In such a case the later special Act will be taken to have amended the earlier general Act in so far as the matters dealt with in the specific Act are concerned.* The Court, however, will assume that the Legislature, in enacting the sections as separate provisions of the same statute or groups of statutes intended full effect to be given to each. It is only when there becomes apparent an inconsistency which it is impossible to avoid by any reasonable interpretation of the words used, that a court will in general draw the conclusion that the Legislature intended the later special statute to repeal the earlier general statute. (Emphasis added.)

[14] It is unfortunate that our Evidence Act 1950 was not consequently amended to cater for evidence taken under MACMA such as the one found under s 77F of the Hong Kong Evidence Ordinance, Chapter 8, which states:

> Admissibility in criminal proceedings of evidence obtained pursuant to letter of request —
>
> (1) Subject to this section and section 77G, any deposition, together with any document or thing exhibited or annexed thereto, which is received by the Registrar pursuant to a letter of request issued by him under section 77E in respect of any criminal proceedings, *shall on its production without further proof be admitted in those criminal proceedings as prima fade evidence of any fact stated* in the deposition and in the document (if any) exhibited or annexed thereto (Emphasis added.)

[15] The learned deputy public prosecutor had submitted that the phrase 'subject to the Evidence Act 1950' should be confined to those parts of the Evidence Act 1950 on the relevancy of facts, in particular ss 6–16. This too could not be a correct interpretation because it would have been so stated in the law if it was meant to be that. It may also well be that that phase is in anticipation of an amendment to the Evidence Act 1950. Be that as it may, it is my view that MAGMA should be read with a degree of liberty so that its objective is met.

[16] For these reasons, I would allow for a revision on the learned sessions court judge's ruling on this issue and make an order that:

(i) the Hong Kong evidence be made admissible and be marked as an exhibit for the prosecution;

(ii) The question of veracity and weight of that Hong Kong evidence be determined by the learned trial judge at a later stage of the proceedings (as is allowed under the guidelines provided by s 8(4) of MACMA).

Order accordingly.

Reported by Peter Ling